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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 956

UNITED PACKINGHOUSE FOOD AND ALLIED WORKERS, AFL-CIO,

Petitioner,

vs.

WILSON & CO., INC.,

Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE BLAKELY PRINTING COMPANY, CHICAGO 56

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On April 26, 1965, this Court denied the Petition for Certiorari in this cause. Taken in conjunction with its earlier actions affirming the judgment in *Independent Petroleum Workers of America, Inc.* v. *American Oil Co.*, Case No. 55, This Term, and denying certiorari in *Gen'l Elec. Co.* v. *Int'l Union of Elec. Workers*, Case No. 413, This Term, the denial unfortunately increases a state of confusion initially occasioned by the Court of Appeals for the Seventh Circuit in the *Petroleum Workers* cases. For the reasons set forth below, we respectfully believe that a rehearing should be granted.

I.

THE COURT'S ACTION IN THIS CASE INEVITABLY COMPOUNDS THE CONFUSION SURROUNDING THE QUESTION OF THE ARBITRABILITY OF CONTRACTING-OUT DISPUTES.

This Court's decision in *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, was handed down on June 20, 1960. It is a fair characterization of its effect to say that, with the major exception of the Court of Appeals for the Seventh Circuit, it led to a widespread recognition that contracting-out disputes are arbitrable, absent an express exclusion. Not only the lower federal courts, but most certainly thousands of lawyers in the labor-management field as well, have viewed it as a key pronouncement and have adjusted their thinking to the admonition that "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause is quite broad." 363 U. S., at 584-85.

The first *Independent Petroleum Workers* case was decided on March 2, 1960, before *Warrior & Gulf*. No effort was made to seek review in this Court. The second decision, *Independent Petroleum Workers of America, Inc.* v. *American Oil Co.*, 324 F. 2d 903 (1963), was decided after *Warrior & Gulf*. Although the Court of Appeals for the Seventh Circuit determined that the grievance was not arbitrable, it is significant that the District Court, which held that it was, observed as follows (215 F. Supp. 1, 3):

> Moreover, that case [the earlier *Petroleum Workers* case] was decided prior to the decision of the Supreme Court in *Warrior*. In its holding the Court of Appeals relied very heavily upon the case of *United Steelworkers of America* v. *Warrior and Gulf Navigation Company*, 269 F. 2d 633 (1959), the decision of the Fifth Circuit which the Supreme Court subsequently

> reversed. Had *Warrior* been decided by the Supreme Court prior to *Independent Petroleum Workers* v. *Standard Oil Co.*, I think the outcome would have been different.

The very fact that the second *Petroleum Workers* case was affirmed by this Court by a four-to-four per curiam order is a strong indication that there is grave doubt as to whether the Court of Appeals or the District Court was correct in its view of the impact of *Warrior & Gulf*.

If one were to attempt to reconcile this Court's denial of certiorari in *Gen'l Elec. Co.* v. *Int'l Union of Elec. Workers*, with its evenly-divided decision in *Petroleum Workers*, one would be compelled to assert that by its action in the *General Electric* case this Court affirmed the principles of *Warrior & Gulf*, and that by its action in *Petroleum Workers* it upheld the collateral estoppel point relied on by the Seventh Circuit.

It is impossible, however, to fit the denial of certiorari in the instant case into this framework. One major reason is the circumstance that this case comes to this Court in a uniquely unsatisfactory state. Neither the District Court nor the Court of Appeals has announced a single valid or comprehensible reason why the dispute is not arbitrable. If, among other purposes, court decisions are meant to serve as guides for the future, it is painfully clear that here the courts have performed no such service.

On June 3, 1964, at the conclusion of oral argument, the Court of Appeals entered an order withholding further action in this case, pending this Court's decision in *Petroleum Workers*, on the ground that "[t]he issues herein are substantially the same as *certain* issues decided by this Court in *Independent Petroleum Workers* v. *American Oil Co.* . . ." (Emphasis added). On January 18, 1965, the Court below rendered a *per curiam* opinion, affirming the

District Court's judgment of dismissal on the basis of this Court's affirmance of the *Petroleum Workers* case, noting that "both parties concede that *the* issue here is substantially the same as that decided by this Court in *Independent Petroleum Workers of America* v. *American Oil Co.* . . ." Apparently, either the Court below had insight which most are not fortunate enough to possess or it elected to engage in speculation as to the grounds of this Court's decision in *Petroleum Workers*. In any event, the Court of Appeals was somehow able to discern that this Court's *per curiam* affirmance of *Petroleum Workers* was based on a resolution of "the same" issue as that in the present case, namely, the issue of the arbitrability of a contracting-out dispute. It apparently failed to recognize (or elected to disbelieve) that this Court's actions may have been based on the "collateral estoppel" issue, *an issue nowhere present in the instant case*. If, as seems most likely, this Court's affirmance did rest upon the collateral estoppel issue, the Court of Appeals could not properly rely on *Petroleum Workers* (as affirmed in this Court) as justification for what it did here.

It goes without saying that the Court of Appeals *did not rely* upon what the District Court determined in granting a motion to dismiss. Quite clearly, the Court of Appeals was of the view that the District Court's reasoning, quite apart from the result achieved, was not tenable. The District Court, after denying Petitioner's motion for summary judgment, dismissed the cause (App. 37). In its opinion (App. 34-37), it observed that the arbitrability of the grievance depended upon "whether the grievance falls within the clause 'pertaining to matters involved in this agreement' [in which event it would be arbitrable], or the clause "incident to the employment relationship,' " in which event it would not be arbitrable. In order to determine which clause applied, the District Court stated that it would

be necessary to hear evidence of the parties' intent. It avoided this necessity, however, by holding that the question of whether the grievance was arbitrable was itself an arbitrable issue, but that this question should have been raised by Petitioner by means of a separate grievance (App. 35-36). Thus the complaint was dismissed on the ground that Petitioner had failed "to exhaust its contractual remedies," *since it had failed to file a second, separate grievance raising the question of the arbitrability of the principal grievance.* The District Court stated that the second, subsidiary grievance "most definitely" would be arbitrable (App. 36).

As a guide for future labor-management relations, the District Court's "separate grievance" theory is as useless as is the Court of Appeals' *per curiam* affirmance. In short, then, neither the District Court nor the Court of Appeals has given a rational answer to the question: *Why is the grievance involved in the instant case not arbitrable?*

With all due deference to this Court, and to the courts below, Petitioner's counsel must admit to total bafflement. This case, together with the tragi-comedy in *Petroleum Workers*, inevitably leaves one in hopeless confusion. It would be far better for this Court to grant this Petition for a Writ of Certiorari and thereafter to affirm, *with a written opinion*, than to leave the issue where it now rests. At least, in that event, lawyers and courts would know what the law is. To know it now, with anything approaching confidence, is impossible.

II.

THE ACTION OF THIS COURT IN PETROLEUM WORKERS HAS ALREADY LED TO JUDICIAL SPECULATION THAT TRIAL COURTS SHOULD CONSIDER EXTRINSIC EVIDENCE OF BARGAINING HISTORY IN DETERMINING WHETHER A DISPUTE IS ARBITRABLE.

The Court of Appeals for the Seventh Circuit is not the only court that has seen fit to speculate as to what this Court was deciding when it affirmed the *Petroleum Workers* case. In *Torrington* v. *Metal Products Workers Union, Local 1645*, 237 F. Supp. 139 (D. Conn. Jan. 20, 1965), a District Court interpreted this Court's affirmance of *Petroleum Workers* as providing *an implied invitation to lower courts to receive evidence of bargaining history* on the issue of whether or not a certain industrial dispute has been excluded from the bargaining agreement. Obviously, whether or not this Court, by its four-to-four affirmance of *Petroleum Workers*, actually approved the fact-finding procedures alluded to in *Torrington* is a matter of conjecture. In view of this Court's denial of certiorari in *General Electric*, a case in which the lower court held that, in determining the arbitrability of a grievance, *a court may not consider extrinsic evidence for the purpose of determining the intent of the parties*, the District Court in *Torrington* may well have conjectured incorrectly. In any event, it is to be expected that lower courts will frequently engage in such speculation. The obvious, undesirable result is bound to be an increasing divergence of judicial opinion on the issue of arbitrability, accompanied by a substantial increase in litigation involving that issue.

If this Court desires to put a halt to speculation on the part of lower courts as to its position concerning the arbitrability of contracting-out grievances, we urge it to rehear and grant the Petition for a Writ of Certiorari in the in-

stant case. Without an explanation and reconciliation of *Petroleum Workers*, *General Electric*, and the instant case, the collective bargaining and arbitration processes may be governed by geographical boundaries rather than legal considerations. At present, contracting-out grievances will not be recognized as arbitrable, under usual contract language, in the geographical area of the Seventh Circuit. Elsewhere, however, they will probably go to arbitration with some regularity. It is difficult to understand why this should be so.

CONCLUSION.

We are mindful of the fact that rehearings are rarely granted. The unusual sequence of decisions and rulings referred to above, however, impels us to urge this Court *to decide* the instant case. A clear judicial pronouncement—*one way or the other*—would be far better than to leave unclarified the muddy results arrived at below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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Counsel for Petitioner.